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March 19, 1999

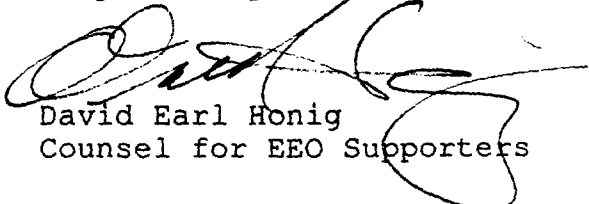
Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Dear Ms. Salas:

RE: MM Dockets 98-204 and 96-16
(Broadcast and Cable EEO)

On behalf of MMTC et al. ("EEO Supporters"),
transmitted herewith are ten copies of Volumes
II-IV of our Comments. Consideration of these
Comments nunc pro tunc is respectfully requested
for the reasons set out in my letter filed
March 1, 1999.

Respectfully submitted,


David Earl Honig
Counsel for EEO Supporters

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 **DOCKET FILE COPY ORIGINAL**

In the Matter of)

Review of the Commission's)

Broadcast and Cable Equal)

Employment Opportunity Rules and)

Policies)

and)

Termination of the EEO)

Streamlining Proceeding)

MM Docket No. 98-204

MM Docket No. 98-204

TO THE COMMISSION

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

COMMENTS OF EEO SUPPORTERS

VOLUME II:

THE OPERATION OF AN FCC EEO REGULATORY PROGRAM

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[list of commenters continued]

[cover page, continued]

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National Association of Black
Journalists
National Bar Association
National Council of La Raza
National Hispanic Media Coalition,
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National Latino Telecommunications
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People for the American Way
Project on Media Ownership
Puerto Rican Legal Defense and
Education Fund
Rainbow/PUSH Coalition
Telecommunications Advocacy
Project
Telecommunications Research and
Action Center
Women's Institute for Freedom of
the Press

March 19, 1999

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INTRODUCTION TO VOLUME II

In Volume I of our Comments (filed March 5, 1999) we demonstrated why EEO regulation is necessary to preserve the good character of the class of licensees, to protect the public from discrimination, to remedy past discrimination, and to promote diversity of voices. This Volume addresses the practical aspects of implementing EEO regulations that are fair, that relieve the public of the burdens of discrimination while not while not imposing unnecessary costs on the industry, and that are reasonably designed to achieve full equal opportunity within the foreseeable future.

IV. Is EEO Compliance "Burdensome?"

A. How much does EEO enforcement "burden" a law-abiding regulatee relative to the value of a broadcast license?

It is offensive to suggest that civil rights compliance is a "burden." If a highway patrol officer spoke of the drunk driving laws as a "burden" from which drinkers need "relief", she would be fired. Thus, it is disturbing to learn that so many industry commenters see civil rights compliance as a mere "burden" and not as either their moral duty as citizens or as an opportunity to run more successful businesses, or both. We will address these contentions in our Reply Comments, but offer these initial thoughts.

The duty of joining in our nation's struggle to achieve full equality is among the greatest honors our system of government bestows on businesses.

This concept is not new to the Commission. Commissioner Clifford J. Durr, to whom these Comments were dedicated, first

raised this issue in 1944. Commissioner Kenneth Cox raised the question of discrimination in program service in 1960, when he served as Chief of the Broadcast Bureau. Later, Commissioners Cox and Johnson, and the Commission's General Counsel, Henry Geller, pulled the full Commission together behind the highly eloquent text of Nondiscrimination - 1968, which contained a moral clarion call to broadcasters to use the gift of the radiofrequency spectrum to heal America's malignant tumor of racism. Their work was Government at its best.

Like "forced busing," "welfare queen," "Willie Horton," and before that "states rights" and "property values," the word "burden" embodies an encoded message of hostility and disrespect for civil rights. In a recent column in the Washington Post, Rashi Fein drove this point home. She discussed a duty most people really do find to be a "burden" -- paying their income taxes:

Burdens are by definition oppressive, and our facile use of the term in connection with our taxes thereby encourages us to do everything we can (within the law) to ease them....Our language shapes our attitudes. To weigh appropriate tax and expenditure policies is difficult when our language encourages us to think of our taxes as burdens not connected to the benefits we derive from them.

Rashi Fein, "Why Do We Call Taxes a 'Burden?'" The Washington Post, May 17, 1996, at A-23. The NPRM was refreshing in its refusal to adopt the encoded hostility inherent in the terminology of "burdens" to discuss civil rights compliance. Indeed, the costs associated with EEO compliance are so slight that characterizing them as "burdensome" is sophistry.

Any so-called "burden" is relative to value. Since the 1996 Telecommunications Act, broadcast industry equity values have skyrocketed. The physical plant of most broadcast stations is

dwarfed by the value of broadcast licenses. In exchange for that extremely valuable privilege, broadcasters have had to fill out a postcard every eight years, put an issues-programs list in their public files every three months, and operate an EEO program. As Commissioner Hooks has observed:

While nobody enjoys filing papers with the government, the [then] triennial requirement for the submission of a program - made much more simple by the Sample EEO Program here adopted - was not a notably heavy burden and symbolized an industry-wide effort as well as operating as an educational tool for the participants.

Nondiscrimination - 1976, 60 FCC2d at 256 (Dissenting Statement of Commissioner Benjamin L. Hooks).

Filling out FCC EEO forms requires little time for the average station, and almost no time for a smaller station. The FCC's estimates for the time required to fill out its broadcast EEO forms, as supplied to the Office of Management and Budget in 1996, were:

- Form 395: between ten minutes and one hour each year
- Form 396: one hour every eight years.

Imputing 40 minutes as the average time to fill out Form 395, it follows that a typical broadcaster would spend an average of 47.5 minutes per year on FCC EEO forms. This works out to less than eight seconds a day to show compliance with the only remaining diversity-promoting FCC rule. There are many regulations whose repeal would offer broadcasters genuine and valuable relief from real burdens, but EEO regulations are not among them.

Day to day EEO compliance is neither difficult nor onerous. The proposed regulations would require licensees to publicize job openings widely enough to ensure that qualified persons of many

backgrounds will be aware of job openings and receive nondiscriminatory consideration. Licensees need not hire unqualified or even "less qualified" persons. Because compliance would be so simple, a licensee would really have to go out of its way not to comply. In our experience, noncompliance requires so much conscious effort that it almost always masks intentional discrimination.

FCC EEO recordkeeping requirements also are nonburdensome. Broadcasters must store such documents as job application forms, interview forms, and copies of letters to placement sources. Storage of these records consumes little time. They are already maintained routinely by every station wishing to defend itself against several types of employment, tort and contract claims regarding hiring, firing, promotion and termination, pensions, wages, benefits, ERISA, overtime, workmen's compensation, accidents and disability -- as well as lawsuits under federal statutes such as Title VII and [42 U.S.C.] Section 1981.^{307/} As former Commissioner Barrett has pointed out, broadcasters must maintain personnel systems and files routinely.^{308/} Furthermore, paperless

^{307/} The documents broadcasters are required to keep are similar to those they keep by the Uniform Guidelines on Employee Selection Procedures, 29 CFR §1607.1 et seq. Wards Cove underscores the value of these records for defendant's proof in a discrimination case.

^{308/} Former Commissioner Barrett wrote: "[s]ome have focused their criticism of the Commission's EEO rules on the alleged undue administrative burden on licensees, particularly 'small' station licensees. However, I am not convinced that this burden is necessarily 'undue.' Stations, be they 'large' or 'small,' must fill vacancies as they arise. Presumably, some form of recruitment is necessary. Additionally, as we are aware, every licensee has other administrative and paperwork obligations to demonstrate compliance with other Commission regulations." EEO Streamlining, 11 FCC Rcd at 5170-71 (Separate Statement of Commissioner Andrew C. Barrett).

offices, e-mail and mass faxing software have virtually eliminated the maintenance and operating costs attendant to such recordkeeping. See p. 7 supra. Thus, the cost of EEO compliance is negligible.

Furthermore, inasmuch as broadcasters face license renewal only once every eight years, the burdens and risks associated with EEO compliance are slight. Broadcasters may eliminate these risks by operating ethically and lawfully.^{309/}

Finally, broadcasters should bear in mind that stronger EEO enforcement would lift two enormous financial burdens imposed on the industry: underutilization of minority and female talent, and the suboptimal economic strength of a two-class society. Broadcasters sometimes exhibit confusion about basic economic principles by focusing on alleged recordkeeping "burdens." If they want to maximize their long term economic well-being, they should understand that the full inclusion of all talented Americans in the broadcasting industry is fundamental to the industry's competitiveness and economic health.

First, goods and services -- including broadcast programming -- can be produced more efficiently, and at lower cost, when the service provider does not artificially restrict the supply of any raw material -- including labor.

^{309/} As the Commission found in 1994, "approximately 96% of the renewals reviewed are granted without reporting conditions and/or sanctions." Report in MM Docket No. 94-34, 9 FCC Rcd 6276, 6294 (1994) ("EEO Report - 1994"). Since 1980, only five applications have been set for hearing with EEO issues. Nobody ever lost a license for violation of the affirmative action component of the Rule, and only three licensees were ever been found to have been unqualified even partly based on violations of the nondiscrimination component of the Rule: Catoclin, Walton, and King's Garden (MO&O), 34 FCC2d 937 (1972) (which has been substantively superceded by Lutheran Church).

Second, discrimination reduces the quality of life for everyone, driving up tax rates to cover the social costs of unemployment and poverty.^{310/}

Discrimination is an economic drag on the economy. Its eradication would do much to "reduce burdens" on broadcasters. As Federal Glass Ceiling Commission Chair Elizabeth Dole declared:

I wanted to issue a "wake-up call" to American Business, telling them in no uncertain terms that if they effectively block half their employees from reaching their full potential, they're only hurting themselves.

Glass Ceiling Environmental Scan at 26. The Glass Ceiling Commission reported that scholarly research

supports the assertion of those CEOs who say that inclusion across the board has been good for business. For example, the J.L. Kellogg Graduate School of Management at Northwestern University, reported on a 1993 study conducted by the Covenant Investment Management firm that rated the performance of the Standard and Poor's 500 on the hiring and advancement of minority men and women, and on compliance with Equal Employment Opportunity Commission and other regulatory requirements. That study then compared these ratings to the annualized return on investment on the stock of these companies over the most recent five-year period. It found that the stock market performance of the firms that had good glass ceiling records was approximately 2.4 times higher than that of the firms that had poor glass ceiling records.

^{310/} The economic cost to society when a discrimination victim does not earn the true value of her labor may be measured in foregone tax revenues, social service savings and productivity. These costs are staggering. Dr. Andrew Brimmer, a former member of the Federal Reserve Board and now an economist specializing in affirmative action, has attempted to quantify the economic costs of discrimination. See A. Brimmer, "The Economic Cost of Discrimination against Black Americans," in M.C. Simms, ed., Economic Perspective on Affirmative Action (Joint Center for Political and Economic Studies, 1995) at 11-29. Dr. Brimmer estimated that the inefficient use of African-Americans' productive capacity costs the economy about \$138 billion annually, which is about 2.15 percent of the gross national product. Id. at 12.

Id. at 61.

Legal scholar S. Jenell Trigg has also made the case that in managing diversity, "[c]ompanies that are able to provide upward mobility, especially to middle-management and leadership positions, will have a competitive edge."^{311/} Her article quoted Lucille Luongo, the former President of AWRT (American Women in Radio and Television) who explained that "the hiring and advance[ment of] women and minorities is good business. Media entities should view the presence of women in the workplace as criteria for success and competitiveness: affirmative action helps to guarantee fairness in media employment and, therefore, the quality of programming."^{312/}

^{311/} Trigg, 4 CommLaw Conspectus at 259.

^{312/} "The Next Step: Lucille Luongo Looks to '96 as a Time for Change," Radio World, December, 1995, at 32, quoted in Trigg at 259. See also H. Holzer and D. Neumark, "Are Affirmative Action Hires Less Qualified? Evidence from Employer-Employee Data on New Hires" (February, 1998) (forthcoming in the Journal of Labor Economics; copy on file with MMTC) (in which Michigan State University economists Harry J. Holzer and David Neumark found that employers who pursue affirmative action were more likely to carefully screen and analyze job applicants, thereby producing a workforce that better suited the companies' needs; and that even at those companies that hired less qualified workers, productivity was not adversely affected because these employers were also more likely than other employers to provide on the job training.)

Ms. Luongo's point concerning the "quality of programming" is worthy of special note. Radio broadcasting is a niche business. To maximize profits, a good radio broadcaster must know how to minimize the transactional costs attendant to changing from one niche to another (e.g. changing formats). Furthermore, to maintain the greatest flexibility in achieving his long term economic options, he must know how to serve each population group. That is possible only with a diverse staff.

Unfortunately, the fact that fair employment is good business has not been enough to lead broadcasters automatically to see the wisdom of practicing fair employment absent regulatory requirements. Corporations do not always act in their own long term best interest or in the national interest. If they did, we would never have fought the Civil War and endured Jim Crow. Nor would the broadcasting industry's top decisionmakers still be virtually all White and male, as they have been for generations.

Even after a generation of EEO regulation, most broadcasters still did little more than minimally comply with EEO requirements. An MMTC study on EEO performance by broadcasters in Tennessee (discussed at 193-201 infra) found that only 27% of broadcasters in Tennessee offered training and internships in 1995, and only 12% of broadcasters attended a job fair in the year before they filed their 1996 renewal applications. This shows that broadcasters have not even bothered to do manifestly nonburdensome tasks that would help them be equal opportunity employers -- giving the lie to their argument that new EEO requirements are too expensive.

In any industry, some businesspeople are more farsighted and capable than others. Not everyone in business is a great businessperson. Unfortunately, some of the least capable broadcasters also fail the public with EEO noncompliance, while crying about how "burdensome" it is to provide equal opportunity. Poor management skills correlate with poor EEO performance.^{313/}

^{313/} The filing of a petition to deny often reveals that a station manager is so disorganized that he or she couldn't even maintain retrievable personnel records. Far too often, civil rights organizations and their counsel have been "thanked" by a licensee's CEO, or by an assignee, for filing a petition to deny which unintentionally drew attention to sloppy or incompetent line management.

The reverse is also true: most of the truly gifted broadcasters also display outstanding EEO records.^{314/} Although there is no regulatory cure for poor management skills, there is a regulatory cure for poor EEO performance.

In sum, EEO is not a burden. The costs of recordkeeping and administration are minimal when compared with the efficiency gains created by nondiscrimination and when compared with the economic value of the right to broadcast.

EEO compliance is essential to the long term financial and moral health of the broadcasting industry -- and the nation. If the broadcasting industry fully understood this, it would insist upon a strong federal program to sanction EEO violators, and it would undertake significant EEO promotion efforts on its own irrespective of cost and irrespective of whether these steps would garner favor with the Federal Communications Commission.^{315/}

B. What would be the result of an EEO exemption for stations with fewer than ten fulltime employees?

The NPRM incorporates from the Streamlining proceeding the question of whether stations with fewer than ten employees should be EEO-exempt.^{316/} The answer is no. They do not suffer a burden

^{314/} Notably, none of the nation's most successful broadcasters felt it necessary to oppose the Commission's proposals. The cable industry -- with much more at stake financially than broadcasters -- has generally supported the Commission's proposals.

^{315/} The absence of EEO regulation would profoundly burden many groups in our society: broadcast viewers and listeners, particularly minorities and women; minority and female job applicants and employees; the educational and civic organizations who seek to place minorities and women in good careers; and EEO compliers, including minority broadcasters, who thrive because EEO regulation has yielded a diverse pool of qualified, trained workers. We will address this point through the statements of witnesses in Volumes III and IV of these Comments.

^{316/} [n. 316 is on p. 185]

warranting an exemption.

An EEO exemption of this nature would be a mistake for at least twelve reasons.

First, any "exemption" that's not truly de minimis is morally repugnant. Commissioner Hooks has explained that "it is almost inequitable to place a filing requirement only on larger stations and treat the filing requirement as if it were a penalty rather than a concomitant of a positive, affirmative national effort to alleviate the patent inequality of opportunity and experienceall licensees are public trustees and all have an equal mandate to serve the same public interest" (emphasis supplied).

Nondiscrimination - 1976, 60 FCC2d at 257 (Dissenting Statement of Commissioner Benjamin L. Hooks). Why would the Commission even consider exempting any station, for any reason and especially for an arbitrary reason, from sharing in the duty to provide equal employment opportunity? The very nature of an exemption implies that EEO is an unpleasant "burden" rather than an initiative serving all broadcasters' long term best interests.

Second, the premise that exempting some stations because others remain non-exempt is offensive when basic consumer protections like civil rights are at stake. Any exemption reduces

316/ The NPRM does propose a good solution to the problem of superduopoly operators gaming the system by claiming either that all employees are "headquarters" employees or by disaggregating superduopoly employees into smaller clusters for EEO purposes only. Id. at 23034 ¶89. For example, an eight-station combination with 20 employees could claim that it is really four two-station clusters, each of which has five employees, and thereby avoid EEO scrutiny entirely; or it could claim that 18 employees are EEO-exempt "headquarters" staff while only two are station staff. The Commission is to be commended for solving this problem.

consumers' well being. Imagine the EPA proposing to "streamline" anti-pollution rules by allowing oil producers with few employees to pollute the groundwater. Imagine the FDA proposing to allow tobacco companies with few employees to spike cigarettes with nicotine, or proposing to exempt food processors with few employees from enforcement of the nutrient requirements in infant formulas.^{317/} We have seen what happened when the FAA exempted small airplanes from safety requirements imposed on large passenger jets -- several small planes crashed and the exemption was ended.^{318/} The continued protection of some persons is no justification to deny civil rights protections to others.^{319/}

Third, the Commission has not assessed how many stations or job positions would be affected by the proposed exemption. Using 1994 (pre-Telecom Act) data, the Streamlining Commission estimated that if the station size cap were ten employees, 18.5% of broadcasting stations, and 10.4% of the employees of stations filing Form 395, would lose their EEO coverage. Streamlining, 11 FCC Rcd at 5174-75 n. 34. Five years later, after substantial industry consolidation, the impact of an exemption could be even

^{317/} See 21 U.S.C. §350a(e) (1996) and 21 CFR §106.100 (1996).

^{318/} Compare 49 U.S.C. §§44701 and 44706 (1995) (aircraft with at least 31 passenger seats) with 49 U.S.C. §40901 (1995) (smaller airplanes). See also 14 CFR §§125.1 and 125.5 (1995)).

^{319/} This conclusion follows whether EEO regulation is viewed as a pro-diversity policy or a civil rights protection. A person denied her civil rights derives little comfort from the assurance that others persons' civil rights continue to be protected. Like civil rights, access to diverse viewpoints is personal to each broadcast consumer. If that consumer's station of choice chooses to operate with a racist or sexist working environment which by definition stifles the germination of alternative viewpoints, a loyal listener or viewer to that station derives little comfort from the fact that other stations may operate as fair employers.

more harsh. It is unwise for the Commission to act without knowing the consequences of its actions.^{320/}

Fourth, the exemption hit especially hard at minorities and women seeking to enter the industry. MMTC's study, "EEO Programs and EEO Performance at Tennessee Radio Stations" (1996) ("Tennessee Study") (contained in Volume III of the MMTC Streamlining Comments and discussed in detail at 193-201 infra) found that smaller stations have relatively more hiring opportunities than larger ones. Tennessee Study at 39. The positions available at smaller stations tend to be the very positions which are essential to the entry of previously excluded groups such as minorities and women. Id. Recalling the history of the EEO Rule, Commissioner Hooks noted that "it is vitally important to have the full participation of the small stations as well as the large because it is natural that the smaller stations serve as a training ground for aspirants in this industry. Hence, consciousness and responsiveness at that level was felt to be of special importance." Nondiscrimination - 1976, 60 FCC2d at 257 (Dissenting Statement of Commissioner Benjamin L. Hooks). Commissioner Barrett agreed, stating that

[w]ee cannot underestimate the importance of "small" stations for minority and female applicants' initial entry into the communications industry....I would argue that applicants, no matter their sex, race or ethnicity, often turn to smaller stations to acquire experience that they need to compete for employment at larger stations. Yet, all too often, I hear from those who have diligently sought employment at broadcast stations, only to be told that they lack the requisite experience. This highlights the "Catch 22" that many minorities and women face when seeking employment with broadcast stations.

^{320/} Ironically, the same people who want this exemption are the same people who didn't want the Commission to have the industrywide data it needs in order rationally to decide whether to adopt any exemption.

Streamlining, 11 FCC Rcd at 5171 (Separate Statement of Commissioner Andrew C. Barrett).^{321/} Further, as the Tennessee Study observed, turnover rate is negatively correlated with staff size -- meaning that smaller stations tend to turn over employees faster than larger stations. Id. at 39.^{322/} The higher turnover rate of smaller stations illustrates that these stations are often a point of entry from which newcomers to the industry advance to larger stations as they develop their careers.

Fifth, EEO enforcement for smaller stations is especially critical because smaller stations' employees are not protected by Title VII, given Title VII's 15-employee jurisdictional limit. Many smaller stations' employees are new to the industry, and their relative lack of job experience and financial resources renders them extraordinarily vulnerable to discrimination. Only the FCC can provide this protection.^{323/}

^{321/} See also Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd at 3967, 3970 ¶22 (1987) ("Broadcast EEO - 1987"), which the Commission retained the five-employee size cap because it "recognize[d] that small broadcast stations often offer opportunities for entry by women and minorities to employment and careers in the broadcast field."

^{322/} This point did not escape the UCC III court either, which observed that in 1976, stations with fewer than ten employees, with 15.1% of the jobs, had 32% of the job opportunities and 41.7% of the entry-level job opportunities. The court noted that "due to higher turnover and a greater willingness to hire inexperienced personnel, the small stations have more entry-level jobs...than their total employee strength indicates." Id., 560 F.2d at 535.

^{323/} The absence of EEOC jurisdiction over smaller stations leaves the FCC as the only line of antidiscrimination defense -- a fact expressly recognized by the FCC's 1978 agreement with the EEOC apportioning EEO jurisdiction between them. See FCC/EEOC Agreement, 70 FCC2d at 2331, Appx. SIII(a).

Sixth, a staff size exemption would hit minorities and women hardest if they have the misfortune of residing in smaller markets -- the very places where most new entrants to broadcasting must begin their careers. In Tennessee, for example, "[p]roposals to deregulate EEO compliance for 'small' stations would exempt 45% of the currently non-exempt Tennessee stations if the size cutoff were ten fulltime employees, 58% of the currently non-exempt Tennessee stations if the size cutoff were fifteen fulltime employees and 70% of the currently non-exempt Tennessee stations if the size cutoff were twenty fulltime employees." Tennessee Study at 36. An increase in the station size cap would likely affect no stations in New York City, Los Angeles or Chicago, and relatively few in Miami, Atlanta or Denver -- but it would cut the heart out of EEO enforcement in employees' point of entry markets like Nashville, Chattanooga and Knoxville.

Seventh, an exemption would deprive broadcast listeners and viewers of the benefits of diversity of voices. A small station's broadcast license is exactly the same broadcast license held by a larger station. Its character requirements are the same character requirements as those of a larger station. The audience seldom knows the difference between a small station and a large station, since they produce the same volume of product. Thus, an employee at a smaller station typically contributes to more hours per week of broadcast programming than her counterpart at a larger station. As such, the smaller station's employee has greater value in promoting diversity of viewpoints than her larger station counterpart. Moreover, because of the growth of media concentration, a smaller, non-duopolized station has a heightened

responsibility to be an alternative, independent voice. Thus, it is even more critical than it was before the age of superduopolies for smaller stations to practice equal opportunity.

Eighth, smaller stations as a group have not earned an exemption by virtue of superior EEO achievements. MMTC's Tennessee Study found that staff size, market size, the size of the minority population in the market and the percentage of the minority population in the market were each uncorrelated with stations' minority percentages of parity for top four category and fulltime employment. Id. at 39. This finding illustrates that EEO achievements and failures occur irrespective of such factors as market demographics and station size. Smaller stations can make no claim of entitlement to an EEO exemption based on their accomplishments relative to other stations.^{324/}

Ninth, an exemption is not justified for reasons of costs to licensees. The UCC III court pointed out that "[n]o matter how informal a station's procedures, the requirement that it periodically think about its EEO efforts seems wholly reasonable." UCC III, 560 F.2d at 534. See also Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 23 FCC2d 430, 433 (1971) ("Nondiscrimination - 1971") (recognizing that EEO requirements could "be met by all

^{324/} EEO opponents will read the foregoing paragraph and scream "quotas," and they will be wrong. Apart from being evidence of discrimination, an individual station's hiring performance is no longer germane to whether it has taken meaningful steps, such as pro-active recruitment, to promote equal opportunity employment. However, the aggregate, industry-wide hiring record is germane to whether steps such as recruitment have been undertaken effectively by the industry, because it is far more likely that minorities and women will be employed at all levels in an industry that informs them of job vacancies than in an industry that prevents them from knowing of job vacancies.

stations, large or small, with reasonable good will.") That holding applies with even more force today, now that recruiting and recordkeeping are trivial expenses.^{325/}

Tenth, a staff size exemption would impede the efforts of larger stations which seek to promote diversity. Cf. Keyes, 413 U.S. at 189. Broadcast employees often gravitate from smaller stations to larger ones as they develop experience and job tenure. Consequently, when minorities and women are denied a meaningful opportunity to enter this small-to-large station pipeline, the larger stations will inevitably be forced to hire from relatively less diverse pools of experienced persons.

Eleventh, an exemption based on staff size would require constant monitoring of the number of a station's employees in order to prevent gaming behavior. "Size" is a moving target: stations could avoid EEO responsibilities throughout a license term simply by dropping below ten employees in their renewal month. While this problem could be partly cured by requiring stations to file EEO programs whenever a Form 395 shows that they exceed the size

^{325/} Fear of large forfeitures should not deter the Commission from regulating uniformly. If a smaller station must pay a forfeiture, the Commission can consider equitable factors such as ability to pay. We would not object to more liberal consideration of this factor in smaller-station cases. Indeed, Commission already takes limited resources into account in establishing forfeitures. See, e.g., Diamond Broadcasting of California, Inc., 11 FCC Rcd 7388 (1996) and Dennis Elam, Trustee, 11 FCC Rcd 1137 (1996) (waiving EEO forfeitures in Chapter 7 bankruptcies); Transnational Network, Inc., 92 FCC2d 324 (1982) (reducing non-EEO forfeiture from \$8,000 to \$100 for station in Chapter 11 bankruptcy); First Greenville Corp., 11 FCC Rcd 7399 (1996) (reducing EEO forfeiture from \$37,500 to \$6,000 based in large part on solvent station's claim of financial difficulty).

exemption level, a much simpler approach would be to leave the size cap unchanged.^{326/}

Twelfth and last, a staff size exemption would not conserve Commission resources. EEO regulation of smaller stations is extremely cost-efficient because it requires virtually no effort from the FCC except once in eight years. At that time, the Commission's effort attendant to renewal is slight.

As the Commission recognized when it adopted the EEO Rule -- and should restate now in case there is any doubt:

the depth and detail of any station's equal opportunity program will be expected to vary not only with the racial makeup of the community and area, but also with the size of the station. We do not expect smaller stations to submit elaborate programs. On the contrary, we recognize that with such smallness, a simpler response is correspondingly to be expected.

Nondiscrimination - 1971, 23 FCC2d at 433.^{327/}

^{326/} Our experience in reviewing EEO programs shows that common wisdom among broadcasters is that if they operate below the EEO size cap at renewal time and later rise above that cap, they are EEO-exempt throughout the license term. However, if they operate above the EEO size cap at renewal time and later fall below it, they become EEO-exempt and do not have to operate an EEO program for the time period when they remain below the size cap. The Commission should clear up this confusion by declaring that a station must operate an EEO program, and have that program on file with the Commission, whenever its Form 395 staff size exceeds the size exemption cap. Among other things, such a clarifying ruling would eliminate the possibility that an intentional discriminator, such as the one in Beaumont, could fire all of its minority employees but escape EEO accountability simply because its discriminatory actions also had the effect of temporarily reducing its size below the EEO exemption cap.

^{327/} While hearings would significantly encumber Commission resources, these are very rare. No EEO hearing since Catoctin (designated in 1985) involved a station with fewer than ten employees. That is not surprising: EEO compliance is so simple for these smaller stations, and both the Commission and citizen groups have given them the benefit of every doubt.

V. Can Outreach-Based EEO Enforcement Be Effective?

A. Has FCC EEO enforcement been effective, consistent, fair -- and necessary?

Critics of Lutheran Church note that in the nearly 30 year history of a regulation that supposedly "pressured" broadcasters to hire unqualified minorities, not one reverse discrimination complaint arose -- probably a record for any civil rights initiative. In addition, careful research on EEO compliance shows that EEO enforcement, resting almost entirely on the recruitment-based approach contemplated by the NPRM, was effective, consistent, fair, and necessary.

MMTC conducted three studies, using publicly available data on EEO compliance and enforcement, which verified the moderate approach taken in EEO enforcement.

1. EEO Programs and EEO Performance at Tennessee Radio Stations (1996)

This study (the "Tennessee Study") was Exhibit 1 of Volume III of the MMTC Streamlining Comments. It is incorporated herein by reference. It was the first major empirical review of broadcasters' EEO performance. MMTC undertook the study to determine which types of broadcasters operate more sophisticated and successful EEO programs, and whether particular EEO compliance techniques tend to be more likely than others to yield successful EEO results. MMTC analyzed 210 license renewal applications for 33

variables reflecting market, station and EEO data.^{328/} The standard measures of central tendency (mean, median, mode) and variability (standard error, skewness and kurtosis) were computed for each variable, and a correlation coefficient (r) was measured for each pair of variables.

The research questions answered by the study were:

1. What are the characteristics of the stations and markets (the "station or market attributes") for a sample of radio stations? ^{329/}
2. What proportion of stations engaged in each of a number of activities designed to promote the recruitment and retention of minorities and women (the "EEO program attributes")? ^{330/}

^{328/} MMTC defined a "station" as an AM radio station unaffiliated with another radio station in its market (an "AM standalone"), an FM radio station unaffiliated with another radio station in its market (an "FM standalone") or an AM-FM combination.

Tennessee stations were among those for which EEO program data (from FCC Form 396) were immediately available from the FCC. Tennessee was selected as the state to be analyzed because it is geographically and demographically representative of the United States. It is a "border state" with large and small, rural and urban markets, and a sizeable minority population which approximates that of the United States. Tennessee is not known as a state whose broadcasters, as a group, have either generally resisted the FCC's EEO compliance efforts or taken the lead in complying with them.

MMTC's source for market size and demographic data was the 1990 Census. MMTC's source for the number of station employees, categorized by race and job category, was each station's 1995 FCC Form 395 (the most recent data then available), giving data for a two week period between January and March of 1995. MMTC's source for EEO program data was each station's 1996 FCC Form 396, which covered the period March, 1995 through March, 1996.

^{329/} EEO station or market attributes include market size, the number and percentage of minorities in the market, the number of persons hired and employed, and the staff turnover rate.

^{330/} EEO program attributes include the number of sources used for job recruitment, the number of those sources which produced job candidates, the operation of a training or internship program, and the station's participation in job fairs.

3. What proportion of stations had achieved various measurable levels of success in recruiting, hiring and retaining minority employees (the "EEO success attributes")? 331/
4. What correlations exist between pairs of variables which each measures a station or market-specific attribute?
5. What correlations exist between pairs of variables which each measures an EEO program attribute?
6. What correlations exist between pairs of variables which each measures an EEO success attribute?
7. What types of stations (see n. 329) operated the most thorough EEO programs (see n. 330)?
8. What types of stations (see n. 329) operated the most successful EEO programs (see n. 331)?
9. What types of activities manifesting the thoroughness of an EEO program (see n. 330) tend to correlate with the most successful EEO programs (see n. 331)?

The study reached these major conclusions:

1. Proposals to deregulate EEO compliance for small stations would have exempted 45% of the currently non-exempt Tennessee stations if the size cutoff were ten fulltime employees, 58% of the then non-exempt Tennessee stations if the size cutoff were fifteen fulltime employees and 70% of the then non-exempt Tennessee stations if the size cutoff were twenty fulltime employees. If the Commission had evaluated staff size based on the number of top four category employees rather than the number of

331/ EEO success attributes include the number of minorities referred for employment, hired, and reported as employees; the proportion of minority candidates in the applicant pool relative to minorities' representation in the population; the proportion of minority employees relative to minorities' representation in the population.

fulltime employees, a ten employee cutoff would have exempted 47% of the then non-exempt Tennessee stations, a fifteen employee cutoff would have exempted 62% of the currently non-exempt Tennessee stations, and a twenty employee cutoff would have exempted 70% of the then non-exempt Tennessee stations.

2. Proposals to deregulate EEO compliance for "small market stations" would have exempted 7.6% of the currently non-exempt Tennessee stations if the market size floor were 20,000, 12.9% of the then non-exempt Tennessee stations if the market size floor were 25,000, 37.6% of the currently non-exempt Tennessee stations if the market size floor were 50,000, and 44.8% of the then non-exempt Tennessee stations if the market size floor were 100,000.

3. Proposals to deregulate EEO compliance for stations in markets with "small minority populations" must be evaluated by first recognizing that 33.0% of Tennessee stations were not required to have an EEO program for minorities, inasmuch as they were situated in markets with less than 5% minority population. If minority population percentage had been used to trigger an EEO compliance exemption, and the minority population percentage floor had been set at 10%, 56% of Tennessee's stations would have been exempt. If the minority population percentage floor had been set at 20%, 88% of Tennessee's stations would have been exempt.

4. The majority of stations were essentially exempt from detailed EEO review because of a low turnover rate in the reporting year. Fifty-eight percent of the stations reported three or fewer top four category hires during the reporting year, and 34% reported three or fewer fulltime hires during the reporting year. Three hires is too small to generate Bilingual review at renewal time.

5. If the Commission shifts its enforcement emphasis from fulltime jobs to top four category jobs, it will need to expand the reporting period (e.g. from one year to four years) in order to obtain the same volume of hiring data on top four category employment which it then obtained for fulltime employment. This follows from MMTC's observations of job turnover rates, which showed that turnover was far more commonplace in the bottom five categories than in the top four categories. While 32% of the stations filing Form 396 reported no top four category hires during the reporting year, only 8% reported no fulltime hires during the reporting year. The median number of top four category hires was three. However, the median number of fulltime hires was six, even though the vast majority of all employees work in the top four categories, as shown by the fact that the median number of top four category employees was eleven and the median number of fulltime employees was twelve. The majority of the stations' top four category job turnover rates were rather low, with 62% of the stations turning over less than 25% of the number of employees they reported in the top four categories, although 38% of the stations turned over less than 25% of the number of fulltime employees they reported. The median percentage of top four category staff which turned over was 9% and the median percentage of fulltime staff which turned over was 33%.

6. A good many stations were escaping Commission scrutiny for obvious potential EEO violations. Six percent of stations reported the use of no referral sources at all and 24% reported no sources which produced minority referrals. Moreover, the median number of productive minority sources was only two. However, 11% of the stations reported five or more productive sources of minority referrals, and 25% of the stations reported five or more productive sources of female referrals. Thus, a handful of stations may well be EEO "superperformers," while the majority of the stations operated EEO programs which were of only marginal effectiveness. This conclusion was also supported by evidence that eleven of the fifteen potential pairs of the six EEO program attributes revealed a statistically significant correlation. Stations which used a large number of referral sources tended to have more productive sources for minorities; those with productive sources for minorities tended to have productive sources for women; those with large numbers of referral sources also tended to offer training or internships and to participate in job fairs; and those offering training and internships were more likely to participate in job fairs.

7. Only 27% of the stations reported offering training or internships, and only 12% of the stations reported participation in a job fair. These low numbers for participation in optional, but obviously useful, EEO initiatives suggest that an EEO regime premised on "self-regulation" would be a failure.

8. A surprisingly high proportion of the stations which reported minority referral data (25%) failed to report a single minority referral in the entire reporting year. With the median

number of minority referrals being four in a year, it is apparent that the majority of the stations should be doing much more to encourage minorities to apply for employment. This conclusion is underscored by the fact that minorities comprised less than 5% of the applicant pool at 30% of the stations, and less than 10% of the applicant pool at 41% of the stations. Furthermore, 27% of the stations had not attained 50% of parity with the workforce in the composition of their applicant pools, even though the pools included applicants for secretaries and janitors.

9. Ten percent of the stations reported no female referrals in the reporting year, and sixteen percent received three or fewer female referrals. Thus, a good many stations should be doing much more to encourage women to apply for employment.

10. The fact that five stations each generated more than fifty minority applicants demonstrates that minority applicants are in plentiful supply. Apparently, minorities are attracted to the stations which have built a reputation for employing them. Similarly, the fact that twelve stations each generated more than fifty female applicants demonstrates that female applicants are in plentiful supply. The fact that the same pattern of high recruitment numbers for a few stations was exhibited for women and also for minorities demonstrates that the high number of minority applicants at a few stations cannot be attributed solely to format considerations.

11. The measures of percentage of parity attained for minority employment shows that substantial progress is yet to be made for top four category positions. While the median minority fulltime employment percentage of parity was 64%, the median

minority top four category percentage of parity was only 46%. This means that approximately half of the radio stations in Tennessee failed the test the FCC formerly used to determine whether thorough review of their EEO programs was needed to exclude the possibility of discrimination.

12. Turnover rate for fulltime employees was negatively correlated with fulltime staff size. This finding demonstrates that larger stations tended to retain employees relatively longer than did smaller stations. On the one hand, this means that statistical review of smaller stations' EEO performance may be had by reviewing minority and female hiring over a period of years. On the other hand, this finding lends credence to some broadcasters' contention that smaller stations (perhaps because of lower pay or less competent management) do not retain employees for as long a time as larger stations. This finding also lends credence to civil rights organizations' contention that smaller stations are a point of entry from which newcomers to the industry advance to larger stations as they develop their careers.

13. The finding that the minority proportion of referrals was correlated with minority employment percentage of parity -- but the raw number of minority referrals was not correlated with minority employment percentage of parity -- underscores the importance of attracting an applicant pool which is representative of the population. Minorities must not only be present in the applicant pool, they not be numerically overwhelmed by other applicants.

14. The finding that no station or market attribute (including market size and demographics and staff size) was correlated with minority employment percentage of parity illustrates that EEO achievements and failures occur irrespective of demographics and station size.

15. The fact that staff size was correlated with the number of referral sources, but not with the number of productive referral sources, indicates that many large stations apparently use their resources to propound long lists of local organizations which may or may not be cultivated as genuine sources of minority or female referrals.

16. The correlation between participation in job fairs and the minority applicant pool percentage of parity suggests that stations participating in job fairs are succeeding in building applicant pools in which minorities are better represented. This finding lends support to the contention that job fairs may be useful in ensuring that minorities are better represented in applicant pools.

2. FCC EEO Forfeitures, 1990-1996 (1996)

MMTC's study, "FCC EEO Forfeitures, 1990 - 1996" was Exhibit 2 of the MMTC Streamlining Comments; it is incorporated herein by reference. It was the first systematic review of how the FCC issues EEO forfeitures. MMTC undertook the study to determine the level of forfeitures, which types of stations typically received forfeitures, and whether the FCC's election to impose a short term renewal was correlated with the amount of a forfeiture.

MMTC reviewed the 115 EEO forfeitures issued by the FCC in connection with license renewal applications filed in the radio renewal cycle running from 1988 to 1991 and in the television

renewal cycle running from 1991 to 1994.^{332/} The FCC issued these decisions between March, 1990 and May, 1996. The six variables studied measured station type (AM, FM, AM-FM or TV), market size, the size of a forfeiture, and whether the station also received a short term renewal.

The standard measures of central tendency (mean, median, mode) and variability (standard error, standard deviation, skewness and kurtosis) were computed for each variable, and a correlation coefficient (r) was measured for each pair of variables.

The research questions answered by the study were:

1. How much did the FCC fine broadcasters for EEO violations? What was the variation in forfeiture amounts?
2. Did AM, FM, AM-FM, or TV stations more commonly receive forfeitures and short term renewals?
3. Did large or small market stations more commonly receive forfeitures and short term renewals?
4. Was there a relationship between the amount of a forfeiture and the issuance of a short term renewal?

^{332/} The decisions in question were issued through May, 1996; a handful of renewal applications filed during those renewal cycles were still pending when the study was completed. Some of the forfeitures MMTC analyzed were issued pursuant to Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, 9 FCC Rcd 929 (1994) ("EEO Forfeitures") vacated on other grounds in Streamlining, 11 FCC Rcd at 5154; those forfeiture amounts and policies are similar to the rules originally considered in Streamlining.

Subsequently, many of the forfeitures issued pursuant to EEO Forfeitures were reduced to conform with the ad hoc forfeiture levels which obtained before EEO Forfeitures was issued. The supplemental decisions reducing some of the forfeitures were not included in MMTC's analysis.

MMTC's source for station types and forfeiture amounts was the FCC EEO Branch's forfeiture database. MMTC's source for market size data was the 1990 Census.

This study's principal conclusions were as follows:

1. The forfeiture amounts ranged from \$2,000 (four stations) to \$37,500 (one station). The median and mode for forfeitures were each \$15,000, and the mean forfeiture was \$15,029. The forfeitures were distributed almost precisely on a bell-shaped curve. Five stations received forfeitures in excess of \$30,000 and five stations received forfeitures less than \$3,000. The standard deviation was \$8,029, meaning that approximately 68% of the forfeiture amounts would normally fall between \$6,993 and \$23,063. Forty-three (37%) of the 115 stations receiving forfeitures also received short term renewals. The study concluded that the almost perfect bell shaped distribution of forfeiture amounts discloses a remarkable even-handedness and consistency in the FCC's forfeiture decisions. Apparently, the FCC considered \$15,000 as a normative forfeiture amount. It then applied upward adjustment criteria almost exactly as frequently as it applied downward adjustment criteria in calculating forfeiture levels.

2. The amount of a forfeiture, and the choice to apply a short term renewal, were each uncorrelated with whether a station was an AM standalone, an FM standalone, an AM-FM combination, or TV station. The amount of a forfeiture, and the choice to apply a short term renewal, were also each uncorrelated with market size. Therefore, the FCC appeared neither to favor nor disfavor one type of station (AM, FM, AM-FM or TV) over another in its allocation of forfeiture amounts and in its decisions on whether to issue short term renewals. Nor did the FCC favor or disfavor small or large market stations in rendering these decisions.

3. The mean forfeiture for the 43 stations given short term renewals was \$20,543, and the mean forfeiture for the 72 stations not issued short term renewals was \$11,847. No station issued a forfeiture of less than \$5,000 received a short term renewal. However, no statistically significant correlation was found between the decision to issue a short term renewal and the amount of a forfeiture. It appears that the FCC's decisions to issue a short term renewal were guided by factors different from those which motivate it to select a forfeiture amount.

In sum, the FCC's range of forfeitures was modest, bell-shaped and almost entirely free of skew either upward or downward from the mean. The FCC's application of upward and downward adjustments appeared to be evenhanded and well within its administrative discretion. As a result, the study concluded that policymaking as to forfeiture amounts should focus largely on the appropriateness of the normative forfeiture amount relative to the normative forfeitures for non-EEO violations, since the FCC's administration of its forfeiture policies was unassailably even-handed.

3. FCC EEO Enforcement, 1994-1997 (1998)

This study (the "Enforcement Study") was filed with the Commission for consideration in the Streamlining docket. It is incorporated by reference herein. It was the first longitudinal analysis of the Commission's EEO enforcement efforts. The study reviewed all 251 EEO enforcement rulings (120 Commission rulings not preceded by a Bureau ruling, and 131 Bureau rulings) from 1994-1997, excluding the Lutheran Church hearing designation order. A handful of these rulings were not yet final orders due to

petitions for reconsideration, but ultimately these petitions seldom materially affected the result of a case.

The study reviewed the following:

1. What was the overall frequency of investigations and range of remedies from 1994-1997?
2. Had the frequency of Bilingual investigations changed since 1994?
3. Had the choices of remedies changed since 1994?
4. Had the FCC been more or less likely to investigate an alleged violation depending upon whether the station is a television station or a radio station?
5. Had the choices of remedies differed for television and radio stations?
6. What had been the frequency of Bilingual investigations in cases originating with internal staff reviews and in cases originating with a petition to deny or an informal objection?
7. What had been the range of remedies in cases originating with internal staff reviews and in cases originating with a petition to deny or an informal objection?
8. Were cases decided by the full Commission, or cases decided by the Mass Media Bureau staff by delegated authority, more likely to have been the subject of a Bilingual investigation?
9. What had been the range of remedies in cases decided by the full Commission and in cases decided by the Mass Media Bureau staff by delegated authority?
10. What had been the range of remedies in cases in which a Bilingual investigation was undertaken and in cases in which such an investigation was not undertaken?

Of the FCC's 251 initial, non-hearing EEO decisions from 1994 through 1997, 156 (62%) were issued following a Bilingual investigation. Ninety-five (38%) were issued based on a record

which did not include a Bilingual investigation. The FCC resolved ninety-six cases (38%) with a ruling absolving the licensee. In 37 cases (15%), the FCC issued a caution or admonishment, but imposed no sanctions. In 32 cases (13%), the FCC issued a conditional renewal, but not a forfeiture or short term renewal. In 65 cases (26%), the FCC issued a conditional renewal and a forfeiture, but not a short term renewal. In 21 cases (8%), the FCC issued a conditional renewal, a forfeiture and a short term renewal.

For the 86 forfeiture cases (including those resulting in short term renewals) the mean forfeiture was \$16,581. For the 65 forfeiture cases not involving short term renewals, the mean forfeiture was \$13,829. For the 21 cases involving forfeitures with short term renewals, the mean forfeiture was \$25,107. The total of all forfeitures was \$1,426,000. The FCC reduced this total by \$177,000 when, in ten instances, it granted licensees' requests to reduce or eliminate forfeitures. Thus, the total of all forfeitures issued between 1994 and 1997 and either collected or collectible, was \$1,249,000.

The FCC initiated 232 (92%) of its EEO enforcement actions as a result of petitions to deny. Nineteen enforcement actions (8%) originated with the FCC's own staff review of applications.

The study drew these conclusions regarding the FCC's EEO enforcement efforts:

1. Between 1994 and 1997, the FCC significantly reduced the proportion of cases in which it conducted an investigation. The frequency of Bilingual investigations decreased after 1994. Of the 44 cases decided in 1994, 41 (93%) had undergone Bilingual investigations. However, of the 64 cases decided in 1995, only 29
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(45%) underwent Bilingual investigations. Similar results obtained in 1996 and 1997.

2. Between 1994 and 1997, the FCC significantly reduced the proportion of cases resulting in liability, and it significantly reduced the magnitude and strength of the remedies it selected when it found liability. The FCC was far more likely to absolve licensees of most or all liability in 1995, 1996 and 1997 than in 1994. Of the 44 cases decided in 1994, it resolved four (9%) with findings of no liability, while it resolved 39 (89%) with reporting conditions or stronger remedies such as forfeitures and short term renewals. Of the 64 cases the FCC decided in 1995, it resolved 46 (72%) with findings of no liability, while it resolved 12 (19%) with reporting conditions or stronger remedies such as forfeitures and short term renewals. The FCC absolved relatively fewer licensees in 1996 than it had in 1995; in 1996, 26 (30%) of its 88 decisions absolved the licensee and 47 (53%) resulted in reporting conditions, forfeitures or short term renewals. In 1997, 20 (36%) of its 55 decisions absolved the licensee and 20 (36%) resulted in reporting conditions or forfeitures.

Not only did the FCC tend to absolve more licensees after 1994, its use of two particular remedies changed dramatically. Of the 21 short term renewals the FCC issued between 1994 and 1997, 19 (90%) were issued in 1994, with one each in 1995 and 1996 and none in 1997. Of the 37 cases the FCC resolved with a caution or admonition only between 1994 and 1997, it issued 15 (41%) in 1997 and 15 in 1996. Only six were issued only six in 1995 and one in 1994.

In addition, the amounts of the FCC's forfeitures declined successively in each year after 1994. The mean forfeiture in 1994 was \$21,586; it was \$19,000 in 1995, \$15,606 in 1996 and \$9,800 in 1997. As noted above, this coincided with a tendency after 1994 to issue forfeitures only in the most egregious cases. Thus, while the FCC was finding that fewer and fewer cases were egregious, it was imposing lower and lower forfeitures in the cases it still deemed egregious. In sum, the FCC appears to have made four procedural choices after 1994:

- to find in favor of licensees much more frequently
- to abandon the use of short term renewals
- to issue admonishments rather than conditional renewals and forfeitures, and
- to assess successively lower forfeitures each year.

3. Radio cases were slightly more likely to result in investigations and liability findings than television cases. There was no meaningful difference in TV and radio forfeiture amounts.

Forty-seven (56%) of the 84 television cases involved Bilingual investigations, while 109 (65%) of the 167 radio cases involved Bilingual investigations. Forty-five (54%) of the television cases resulted in findings of no liability, while 51 (31%) of the radio cases resulted in findings of no liability. There was virtually no difference in the mean forfeiture levels for TV and radio forfeiture cases. The slightly lower frequency of investigations and adverse findings for television vis-a-vis radio stations may be attributed to the fact that television stations, being larger and better financed than most radio stations, tend to retain better records to document their EEO activities.

4. When the FCC's staff reviewed a renewal application on its own motion, it virtually always did so through a Bilingual investigation. A slight majority of cases originating with a petition to deny underwent Bilingual investigations. Of the 19 cases originating internally within the FCC's staff, 18 (95%) involved Bilingual investigations. Of the 232 petition to deny cases, 138 (59%) involved Bilingual investigations. The high proportion of internally-generated cases resulting in Bilingual investigations may have been attributable to the FCC staff's election to devote the limited resources available for opinion-writing to the most egregious matters. Many EEO programs, on review by the Bureau internally, undergo substantive review without the generation of a written opinion.

5. Cases originating with a petition to deny were more likely to result in no-liability findings than cases originating with the FCC's staff. The origin of a case did not seem otherwise correlated with the remedy chosen. Ninety-three (40%) of the 232 petition to deny cases resulted in findings of no liability. Only three (16%) of the 19 cases originating with the FCC's staff resulted in no-liability findings. However, in cases not resulting in no-liability findings, there does not appear to be a correlation between the remedy imposed and the origin of the case. Many of the no-liability findings apparently originated with pro se petitions to deny which failed to state a prima facie case.

6. Cases decided by the full Commission were far more likely to have involved Bilingual investigations than cases decided by the Bureau. While only 17 (13%) of the 131 cases decided by the

full Commission had not undergone a Bilingual investigation, 78 (65%) of the 120 cases decided by the Bureau had not undergone a Bilingual investigation. Thus, if no Bilingual investigation had been undertaken, a case was five times more likely to be decided by the Bureau than by the full Commission. Put another way, 35% of Bureau cases involved Bilingual investigations while 87% of full Commission cases involved Bilingual investigations.

7. Two-thirds of Bureau decisions involved no-liability findings, while two-thirds of Commission decisions involved forfeiture orders. Seventy-nine (66%) of the 120 Bureau cases were resolved with no-liability findings, 27 (22%) with cautions or admonishments, and 14 (12%) with conditional renewals. On the other hand, 17 (13%) of the 131 full Commission decisions were resolved with no-liability findings, ten (8%) with cautions or admonishments, 18 (14%) with conditional renewals but no forfeiture, and 86 (66%) with forfeitures, 21 of which also involved short term renewals. As many as 45 (35%) of full Commission decisions had no-liability findings, admonishments or conditional renewals without forfeitures. Thus, referral of a case by the Bureau to the full Commission did not automatically mean that the case was destined for a forfeiture or other sanctions.

8. The decision on whether to investigate a case generally drove its outcome. Of the 156 cases investigated through the Bilingual process, 21 (13%) resulted in no-liability findings, 20 (13%) in cautions or admonishments, 30 (19%) in a conditional renewal but no forfeitures, and 85 (54%) in forfeitures, including 21 which also resulted in short term renewals. Of the 95 cases not investigated through the Bilingual process, 76 (80%) resulted in

no-liability findings, 16 (17%) in cautions or admonishments, and two (2%) in a conditional renewal but no forfeitures. One case not investigated through the Bilingual process resulted in a forfeiture. Thus, the Bureau's original decision to investigate a case generally drove the outcome.^{333/}

^{333/} Reviewing this point, the study concluded:

Certainly where a petitioner to deny did not make out a prima facie case of possible discrimination or other EEO violations, the licensee was more likely to have complied with the EEO Rule than a licensee for which a petitioner to deny did make out a prima facie case. However, without an investigation it is generally impossible to know whether a poor EEO record is attributable to intentional discrimination or other egregious EEO violations suggestive of discrimination. For example, suppose a licensee sent job notices to referral sources only once a year, rather than upon each job opening, and notified minority organizations and receives minority applicants only when it had secretarial openings. Such a licensee would have been able to file an EEO program claiming several minority "referral sources" and several minority applicants. This would have been enough to rebut any prima facie case by a petitioner to deny and thereby prevent the initiation of a Bilingual investigation. However, a Bilingual investigation invariably ferrets out weak EEO programs such as those in this example, resulting in sanctions. While not every petition to deny merits an investigation, more investigations would probably unmask more EEO violations. The more frequent use of investigations would prevent licensees from immunizing themselves from EEO scrutiny by sending once-a-year EEO notices and by occasionally hiring a minority in a token, low level position.

Enforcement Study at 24.

From these three studies, the Commission should be confident that the regime of EEO enforcement it had established before Lutheran Church bore no attributes of unfairness to licensees. It

was modest in scope, balanced in application, and subject to criticism only because it so seldom resulted in serious consequences for EEO violators. Those criticizing the new proposed regulations as draconian stand on shaky ground, since these regulations are even less aggressive than the manifestly nonaggressive former regulations.

Furthermore, although broadcaster compliance was often minimal or nonexistent, the Tennessee Study found that broadcasters making greater EEO efforts overwhelmingly had more success in engaging minority employees. The EEO Rule worked.

B. When broadcasters recruit, do minorities and women secure entry opportunities otherwise unavailable to them?

The Tennessee Study disclosed a powerful correlation between recruitment effectiveness and minority employment levels. Additional anecdotal evidence may be derived from the experiences and observations of minorities and women who secured their chance to enter the industry through the outreach efforts of EEO-positive broadcasters. This evidence will be provided in Volume III and discussed in Volume IV of these Comments.

C. Have broadcasters recruited minorities and women whenever jobs were open, as they promised the FCC?

The effectiveness of any regulatory initiative depends on its acceptance and adherence by licensees even when the agency is not directly monitoring compliance. Civil rights advocates have long suspected that many broadcasters have told the FCC that they recruit from a variety of sources whenever jobs are open, while in practice omitting to do so. Thus, MMTC commissioned a study of this question. It was prepared by Dr. Audrey J. Murrell, Associate

Professor at the Katz School of Management, University of Pittsburgh. Dr. Murrell's study, "Verification of Recruitment Sources within the Radio Broadcast Industry: An Empirical Study of EEO Compliance" ("Verification of Recruitment Sources") is appended hereto. Her Executive Summary describes the methodology and results:

This study attempts to verify the recruitment practices of AM and FM radio stations filing licence renewal applications for the period of January 1, 1997 and December 31, 1997. The central question posed by this research is whether broadcasters fully utilized well-established minority and female applicant sources as detailed in their filings (EEO Form 396) with the Federal Communications Commission. In addition, this research examines whether market characteristics (size, racial composition) are related to the utilization of minority recruitment sources. A total of 503 stations across 20 designated market areas that filed licence renewal applications during this time period were selected for inclusion in this research. Based on 1998 Arbitron Metro Survey Area Rankings, the 20 markets were randomly selected and grouped into four categories: 1 to 50, 51 to 100, 101 to 150 and 151 to 267. Sources listed on the licensee's renewal application were first located and then contacted for a brief telephone interview to verify the information submitted on the EEO Report (FCC Form 396).

Overall only 12% of the valid sources listed on the renewal applications could be verified. Not surprisingly, a higher percentage of sources were verified for stations within the top markets (1 to 50) while none of the sources within the 100 to 150 group could be confirmed. Despite their large pool of available resources, a number of sources listed by stations within the top market group either could not be located (45%) or contacted (31%). Among all sources that could be verified, only 41 (14%) confirmed that they had been contacted by the station with recruitment information during the target period. Again, this was most prominent among stations within the top market group. For all sources verified, the frequency of contact with the station occurred either every two months (7%) or as needed (8%). Within top markets, sources that were contacted by a station with job recruitment information were asked about other diversity activities targeted toward minorities and women a small percentage of the time (6%).

The study concluded:

We find the current practices of recordkeeping among licensees to be minimal, irregular and frequently unverifiable. Across all market sizes, 88% of all valid sources could not be located. Among those located, 73% could not be contacted and 47% of those contacted could not verify the information submitted by the stations on their licence renewal applications. Current EEO requirements for recordkeeping do not provide guidelines for the standardization of information collected (such as specific identification of the source, contact person, frequency of contact, etc.) This leads to the tremendous variability in the quality of information that is submitted to the FCC among licensees. The effectiveness of self-assessment and self-verification among stations may be only slightly related factors such as the size of the market and representation of minority within the market; although this is difficult to determine from these data. Thus, any attempts at reducing the requirement of documenting recruitment activities would most certainly lessen the quality and rigor of the information collected and further increase the variability of this information across all broadcasters and even among stations within the same market.

Another implication of these findings is that to the extent that sources can be verified, there is limited evidence of an association with other efforts toward the enhancement of diversity. This lack of ongoing efforts exists regardless of market rankings, size or percentage of minority representation within the market. While this study does not examine the outcomes in terms of hiring or promotion, it does suggest that a potential benefit of utilizing diverse community resources for recruitment of women and minorities is being underserved by stations within our study.

Our findings support the notion that the ability to verify stated recruitment activities among licensees is greater within top markets compared to small markets. While this may pose a slight advantage for stations within larger market areas, we must emphasize that even for stations within these top markets the percentage of verifiable recruitment source information was still quite low. For stations within small markets, there was no evidence of compensation for these limited community resources by the use of other diversity activities within minority organizations identified in their EEO programs.

A key aspect of the success of any anti-discriminatory effort is the level of specificity of the policy or initiative in setting conditions, requirements, and in outlining processes and desired outcomes (Murrell and Jones, 1998). The requirements set forth by the FCC help to insure that minimum efforts are maintained; however, without specific guidelines or ongoing verification, the rigor of any efforts by broadcasters may be difficult to sustain and impossible to corroborate. Thus, while the presence of an EEO rule is a necessary condition for maintaining efforts toward equality in access and opportunity, our findings suggest that such a rule itself is not sufficient. Requirements for recruitment and outreach efforts should be supported by ongoing efforts at validating the proposed activities submitted by stations applying for licence renewal. New standards for EEO outreach efforts and requirements can only serve to enhance the process of validation we attempted here.

It is significant that most recruitment claims on Form 396 could not be independently verified, largely because licensees were not required to provide names and contact information of the persons with whom they interacted. For example, an EEO program would only state "NAACP" or "NOW", which would hardly enable anyone independently to verify the licensee's claims. This is easily corrected. See p. 249 infra.

It is alarming that a very high proportion of licensees' claims that they contacted recruitment sources were probably untrue. Table 3 of Dr. Murrell's study discloses that of 54 sources that could give a "Yes" or "No" answer to the question "was your organization contacted in 1997 and 1998," 13 (24%) said "No." Even if the rate of nonperformance of these promises to the FCC were only half of that 24% nonperformance rate, the Commission would have reason to be concerned. Far too many licensees were telling the FCC one thing but doing another.
